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Supreme Court, U.S.
FILED

10-231 AUG 11 2010

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

KENNETH L. GRAY

Petitioner

vs.

GENERAL ELECTRIC COMPANY,
a/k/a GE MONEY, *a/k/a*
GE CORPORATE FINANCIAL SERVICES,
a New York corporation

Respondent

On Petition for Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the District Court commit errors in the issue and reissue of the Certificate of Appealability that cannot be overlooked by any court because the errors denied Plaintiff his constitutional right to due process? [1]

2) Did the Second Circuit err when it ruled that an appeal tolls from the date of the first issue of an order or Certificate of Appealability and not the last reissue? [2]

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[1] *See* Chapman v. California 386 U. S. 18.

[2] *See* Marisol A. by Forbes v. Giuliani, 104 F. 3d 524, 527 (2d Cir. 1996).

LIST OF PARTIES

1) KENNETH L. GRAY, Plaintiff, Petitioner.

2) GENERAL ELECTRIC COMPANY, a/k/a GE MONEY, a/k/a GE CORPORATE FINANCIAL SERVICES, Defendant and Respondent.

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JURISDICTION

The jurisdiction of the Supreme Court of the United States to review the judgment and decree of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

Fifth Amendment To The United States Constitution

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Federal Rules of Appellate Procedure, Rule 5(a)

The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Federal Rules of Appellate Procedure, Rule 4(a)

(1) Time for Filing a Notice of Appeal. (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c)), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case

Plaintiff was employed by Defendant General Electric Company ("Defendant," "GE") as a Senior Database Administrator until his employment was involuntarily terminated in 2008. In both his annual reviews, Plaintiff was rated as a "highly valued employee" and was paid performance bonuses. Pursuant to FMLA, Plaintiff took periodic physician-approved unpaid leave in the spring of 2008. Plaintiff asserts that he was immediately subjected to a series of illegal retaliatory acts culminating in the termination of his employment.

When Plaintiff was hired in 2006, Plaintiff and Defendant entered into a mediation and arbitration agreement known as the "GE Resolve Process" to resolve any "covered" employment related disputes. However, the GE Resolve agreement did not specifically include FMLA as "covered," and even if it had, an employee cannot legally waive FMLA rights. "Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA." 29 CFR § 825.220(d)

Any reasonable employee would not knowingly sign an agreement that violates the law, and any reputable employer would not induce an employee to do so. Therefore, Plaintiff filed suit in the U.S. District Court for the District of Connecticut.

B. The District Court Proceedings

The District Court granted Defendant's Motion to Stay Proceedings and Compel Arbitration. The District Court also ruled that its decision was not subject to appeal, as follows: "The granting of a stay is an

unappealable interlocutory order under Section 16(b) of the Federal Arbitration Act. 9 U.S.C. § 16." Ruling on Plaintiff's Motion for Amended or Additional Findings (Docket #18), p. 2 ¶1.

Nevertheless, Plaintiff filed a request to appeal with the Second Circuit, and the Second Circuit granted Plaintiff permission to appeal if the District Court approved. The District Court then issued a Certificate of Appealability in the form of an Electronic Order. Appendix, A-1.

When the District Court issued its Certificate of Appealability on December 2, 2009, the Order included no mention that it was issued pursuant to any particular statute or rule. F.R.C.P. Rule 5(a) states, "The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal."

Since no statute or rule was cited in the Certificate of Appealability as authorizing the appeal, F.R.C.P. Rule 4(a) applied, which requires the appeal to be filed within 30 days after a Certificate of Appealability is issued. Thus, the Petition for Permission to Appeal was due on January 2, 2010, and Plaintiff filed it on December 28,2009.

On January 13, 2010, at the request of the Second Circuit Clerk's Office, the District Court reissued the Certificate of Appealability, adding "28 U.S.C. Section 1292(b)" as the authorizing statute. Thus, this reissue reset the filing deadline to January 13, 2010, plus ten business days (since the time limit for filing an appeal under 28 U.S.C. § 1292(b) is ten days). Plaintiff elected to not re-file his Petition for Permission to Appeal, since it had already been filed in a timely manner, as noted above.

C. The Appellate Court Proceedings

Even though there was no mention in the original Certificate of Appealability that it was issued pursuant to 28 U.S.C. § 1292(b) or any other statute, Defendant objected to Plaintiff's Petition for Permission to Appeal on the grounds that it was not filed within ten days of the issue of the original Certificate of Appealability.

The Second Circuit accepted Defendant's objection at face value and simply claimed that the Second Circuit had no jurisdiction to hear the case because the Petition for Permission to Appeal was (allegedly) filed late.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review is warranted because Plaintiff complied fully with the Federal Rules of Civil Procedure when he filed his Petition for Permission to Appeal and any deficiency (if it existed) was beyond Plaintiff's control.

F.R.C.P. Rule 5(a) states, "The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal." The District Court recognized its error in not specifying the authorizing statute and therefore reissued the Certificate of Appealability. However, the District Court's error should not have given rise to a prejudicial ruling against Plaintiff by the Second Circuit. *See* § II herein.

Since no "statute or rule" was cited as "authorizing the appeal" in the Certificate of Appealability, until it was reissued on January 13, 2010, F.R.C.P. Rule 4(a) applied,

which requires an appeal to be filed within 30 days after an order is issued by the Court. Before the reissue of the Certificate of Appealability, the Petition for Permission to Appeal was due on January 2, 2010, and Plaintiff filed it on December 28, 2009.

If the original Certificate of Appealability had cited 28 U.S.C. § 1292(b) as the authorizing statute, Plaintiff easily could have and would have filed within ten days of December 2, 2009, since he prepared the Petition for Permission to Appeal early and held it for continued review until the 28th day, because under the Federal Rules of Civil Procedure, Rules 4(a) and 5(a), 30 days is allowed to appeal an order unless a statute is cited in the Certificate of Appealability that provides a different length of time.

II. Review is warranted because the District Court committed errors in the issue and reissue of the Certificate of Appealability, errors that cannot be overlooked by any court because the errors denied Plaintiff his constitutional right to due process.

A. Indisputable Errors

1. Since the Second Circuit Clerk's Office had to correct the action of the District Court– instructing it to add the authorizing statute to its Certificate of Appealability, there is no question that the District Court erred when it issued the original Certificate of Appealability as first published.

2. There is also no question that the District Court erred when it modified the original Certificate of Appealability, because that modification (allegedly) imposed a new statute of limitation upon Plaintiff

retroactively, which was surely not the intent. The District Court's reissue of the Certificate of Appealability on January 13, 2010 would have sufficed to meet the request by the Second Circuit Court Clerk's Office.[3]

3. An unaltered copy of the Certificate of Appealability, dated 12/2/09, was not preserved in the record by the District Court. This oversight constitutes the third error made by the District Court in the handling of the Certificate of Appealability. Appendix, p. A-1

B. Errors Were Not Harmless

Thus, the question before this Court is whether or not these errors can be held to be harmless. The standard for making this ruling was firmly established by this Court in Chapman v. California 386 U. S. 18 ("Before a constitutional error can be held harmless, the court must be able to declare its belief that it was harmless beyond reasonable doubt." Pp. 386 U. S. 21-24.

In the present case, it is impossible for any court to declare that the District Court's errors were harmless because they directly resulted in the Second Circuit's decision to rule that it had no jurisdiction to hear this case.

Federal Rules of Civil Procedure, Rule 61, states, "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Inherent in this rule, is the provision that errors that do affect a party's substantial rights cannot be disregarded.

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[3]The Reissue of the Certificate of Appealability was also entered as a separate line item in the Docket. Appendix p. A-1, item 2

C. Recap of the Error Sequence

At the request of the Second Circuit Court Clerk's office, the District Court reissued the Certificate of Appealability to add the statute under which it was issued. Up to that point, the Certificate of Appealability did not include reference to any statutory authority, meaning that the 30-day time limit for appeal applied from the date of the issuing of the original Certificate of Appealability, and Plaintiff filed his appeal within the allotted 30 days. The reissuing of the Certificate of Appealability presented no problem *per se* because the statute cited in the reissue allowed ten days from the date of reissuing to file, and Plaintiff had already filed his Petition for Permission to Appeal.

Looking at the original Certificate of Appealability, the Second Circuit wrongly assumed that the ten-day filing deadline existed at the time the original Certificate of Appealability was issued, when in fact the 30-day appeal window was in effect until the date of the reissuing of the Certificate of Appealability. Thus, Plaintiff's filing was never late, but the District Court's errors made it appear as if it were filed late.

D. No Rationale for Claiming Lack of Jurisdiction

If litigants were required to presume that there is a particular statute under which all Certificates of Appealability are issued, then it would not have been necessary for the Second Circuit Clerk's Office to require the reissuing of the Certificate of Appealability with the instruction that 28 U.S.C. Section 1292(b) or the relevant statute must be cited in the Certificate of Appealability.

Regardless of where the fault lies—with the District Court's errors or with the Circuit Court's judgment, the failure of the Second Circuit to consider an appeal that was not filed late, while falsely alleging that it was filed late, clearly denied Plaintiff due process of law in violation of the Fifth Amendment. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . Fifth Amendment to the United States Constitution.

III. Review Is Warranted Because The Circuit Court Failed to Consider the Reasons Why Plaintiff's Appeal Was NOT Filed Late, as a Matter of Fact and Law.

In the reissue of the Certificate of Appealability, the District Court specified for the first time that the appeal would be pursuant to 28 U.S.C. § 1292(b), thereby giving rise to ten days to file from the date of reissuing.

However, the Second Circuit wrongly overlooked the fact that the District Court's reissue of the Certificate of Appealability reset the time limit for filing Plaintiff's Petition for Permission to Appeal. Marisol A. by Forbes v. Giuliani, 104 F .3d 524, 527 (2d Cir. 1996) (holding that the ten-day filing period of 28 U.S.C. § 1292(b) is a jurisdictional requirement which tolls from the date of the last reissue of an order).

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Dated August 11, 2010.

Respectfully submitted,

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